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No. 08-545

IN THE

Supreme Court of the United States

BRYANT LAWSON, *et al.*,

Petitioners,

v.

BERETTA U.S.A. CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Beemiller, Inc. d/b/a Hi-Point Firearms has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Beretta U.S.A. Corp. is majority owned by Beretta Holding S.p.A., which is not a publicly held company. There are no publicly held companies that own ten percent or more of Beretta U.S.A. Corp.'s stock.

Browning Arms Company's parent corporation is Browning, whose parent is BWA, Inc. There are no publicly held companies that own ten percent or more of Browning Arms Company's stock.

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Taurus International Manufacturing, Inc. has no publicly held corporate parents, subsidiaries or

affiliates. There are no publicly held companies that own ten percent or more of its stock.

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BRIEF IN OPPOSITION

Respondents Beemiller, Inc. d/b/a Hi-Point Firearms, Beretta U.S.A. Corp., Browning Arms Company, Century International Arms, Inc., Colt's Manufacturing Company LLC, Fabbrica d'Armi Pietro Beretta S.p.A., Forjas Taurus, S.A., Glock Ges.m.b.H., Glock, Inc., Heckler & Koch, Inc., H&R 1871, Inc., K.B.I., Inc., Phoenix Arms, Sigarms, Inc., Smith & Wesson Corp., Sturm Ruger & Co., Inc., and Taurus International Manufacturing, Inc., ("Respondents") respectfully request that the Court deny the petition for a writ of certiorari filed by Bryant Lawson, *et. al* ("Petitioners") for three fundamental reasons:

First, the District of Columbia Court of Appeals applied the same rule of law followed by every federal Court of Appeals in holding that Petitioners' pending tort claims, which had not ripened into final, unappealable judgments, are not vested rights and can be legislatively modified consistent with due process.

Second, no constitutional principle requires Congress to provide a substitute remedy when it abrogates or modifies a pending state law claim and, in any event, the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA" or the "Act") does not eliminate all remedies.

Third, the Court of Appeals applied the correct legal standard in reviewing Petitioners' substantive due process challenge to the PLCAA and properly upheld the Act.

In short, Petitioners have presented no compelling reason for certiorari.

REASONS FOR DENYING THE WRIT

In a unanimous opinion dated January 10, 2008, the District of Columbia Court of Appeals held that the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 – 7903 (2005) (the "PLCAA" or "the Act") preempts and bars Petitioners' claims against firearm manufacturer defendants under the District's Assault Weapons Manufacturing Strict Liability Act, D.C. Code § 7-2551.01 *et seq.* (the "Strict Liability Act"). In doing so, the court joined two federal courts in rejecting plaintiffs' challenges to the constitutionality of the PLCAA. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008)[1]; *Ileto v. Glock*, 421 F. Supp. 2d 1274, 1298-1304 (C.D. Cal. 2006) (appeal pending).

With respect to Petitioners' due process challenge, the court held that the PLCAA is an example of legislation "adjusting the burdens and benefits of economic life" that is subject to rational basis review, and that Petitioners failed to meet their burden of showing that Congress acted arbitrarily or irrationally in enacting it. App. 18a –21a. The court rejected Petitioners' argument that their cause of action under the Strict Liability Act is a vested property right that cannot be retroactively abridged by the PLCAA. *Id.* at 21a – 27a. In doing so, the court joined this Court and scores of other courts across the country in holding that a person does not have a vested right in a cause of action absent a final, unappealable judgment, and the government can modify or abolish pending claims through retroactive

[1] The plaintiff in *City of New York* has filed a separate petition, on different grounds, for a writ of certiorari to this Court. *See* Case No. 08-530.

legislation, consistent with due process, as long as the legislation is reasonably related to a legitimate governmental purpose. *Id.*

In their petition for a writ of certiorari, Petitioners continue to press their out-dated "vested rights" theory, arguing that the PLCAA is unconstitutional because (1) it retroactively eliminates Petitioners' pending tort claims, and (2) it provides no countervailing benefit or *quid pro quo* for the rights eliminated. The petition is without merit. Petitioners have no vested right in their tort claims absent a final, unappealable judgment, and there is no constitutional requirement that the legislature provide a substitute remedy whenever it preempts state law. Congress exercised its valid authority under the Commerce Clause through rational means in enacting the PLCAA, which is plainly constitutional.

There is no reason for this Court to grant review of this case. There is no conflict on "an important question" between lower courts or between the holding of the court below and the decisions of this Court. Supreme Court Rule 10. The Court of Appeals' analysis is consistent with many decisions by this Court and federal appellate courts upholding the right of Congress to enact legislation modifying, abolishing, or otherwise affecting pending claims, subject only to rational basis review. The PLCAA easily passes muster under that standard.

I. The Lower Court Joined Every Federal Appellate Court To Have Addressed The Issue In Ruling That Petitioners' Pending Tort Claims Did Not Give Rise To A Vested Right In The Absence Of A Final, Unappealable Judgment And Could Be Legislatively Modified, Consistent With Due Process, Subject Only To Rational Basis Review

Petitioners argue that Congress cannot exercise its authority under the Commerce Clause to retroactively abolish pending tort claims without running afoul of the Due Process Clause of the Fifth Amendment. Petition at 10-15. Petitioners' argument is contrary to settled law, over which there is no conflict between the Circuits. As the Court of Appeals properly held, a person does not have a vested right in a cause of action absent a final, unappealable judgment, and the government can modify or abolish pending claims through retroactive legislation, consistent with due process, as long as the legislation is reasonably related to a legitimate governmental purpose.

The principle that legal claims do not automatically give rise to vested rights has deep roots in this Court's jurisprudence. *See, e.g., New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."); *Duke Power Co. v. Carolina Environ'l Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of

old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby.") (internal citations and quotation marks omitted).

This rule is a corollary to the principle that a "court should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit," *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994) (citation and internal quotation marks omitted) – a principle applied by this Court over two hundred years ago in the case of *United States v. Schooner Peggy*, 5 U.S. 103 (1801).[2]

As the lower court recognized (App. 23a – 24a), this Court recently reaffirmed that principle, and cited *Schooner Peggy* approvingly, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), in explaining the difference between pending claims (which are subject

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[2] In *Schooner Peggy*, Chief Justice Marshall, writing for a unanimous Court, reversed a judgment condemning a French vessel seized on American waters because an intervening treaty, first enacted while the case was on appeal, provided for the restoration of captured property "not yet *definitively* condemned." *Id.* at 107. "[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.* at 110. *See also 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795 (1947), *modifying* 331 U.S. 199 (1947) (after affirming judgment for overtime pay due plaintiffs under Fair Labor Standards Act, remanding case, on timely motion for rehearing, for consideration of effect of newly enacted Portal-to-Portal Act which gave employers good-faith defenses to back overtime pay suits under Fair Labor Standards Act).

to modification through retroactive legislation) and final, unappealable judgments (which are not):

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly. *See United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-280, 114 S.Ct. 1483, 1501-1505, 128 L.Ed.2d 229 (1994) . . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.' *Schooner Peggy*, *supra*, 1 Cranch, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was.

Id. at 226-27. *See also Gavin v. Branstad*, 122 F.3d 1081, 1091 (8th Cir. 1997) ("The doctrine of vested rights . . . like the separation-of-powers doctrine expounded in *Plaut*, depends on the existence of a final judgment . . . [and] is really only the due process analogue of the separation-of-powers doctrine that prevents Congress from reopening final judgments.").

Applying these principles, courts across the country have rejected challenges, similar to the one

advanced by Petitioners here, that federal statutes modifying or abrogating pending state tort claims violate due process. *See, e.g., Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (retroactive application of Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA") to employee's claim on appeal was constitutional, even though it resulted in setting aside plaintiff's judgment: "The fact that the statute is retroactive does not make it unconstitutional as a legal claim affords no definite or enforcible [sic] property right until reduced to final judgment.") (citations omitted); *Salmon v. Schwarz*, 948 F.2d 1131, 1142-44 (10th Cir. 1991) (upholding retroactive application of FELRTCA to pending tort claim); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (same); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (retroactive application of Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, 42 U.S.C. § 2212, which resulted in dismissal of widow's lawsuit against government contractor for wrongful death and loss of consortium arising from her husband's death from radiation exposure did not violate due process: "Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort."); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (retroactive application of Price-Anderson Amendment requiring application of Pennsylvania's statute of limitations to all actions arising from Three Mile Island nuclear accident did not violate due process even though it resulted in dismissal of plaintiffs' lawsuits filed in Mississippi

under longer statute of limitations); *Lyon v. Agusta S.p.A.*, 252 F.3d 1078, 1086-87 (9th Cir. 2001) (application of statute of repose in General Aviation Revitalization Act barring product liability action against aircraft manufacturer based on date of delivery of aircraft did not violate due process, even though Act was enacted after accident for which plaintiffs were suing). Indeed, every federal appellate court that has addressed the issue has concluded that there is no vested right in a cause of action absent a final, unappealable judgment.[3] The lower court properly applied the same rule here. App. 22a – 27a.

The lower court correctly held that where, as here, Congress has used its authority under the Commerce Clause to "adjust[] the burdens and benefits of economic life, [the legislation] come[s] to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in

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[3] In addition to the cases cited above, *see, e.g., In re Consolid. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) (a tort claim "is inchoate and affords no definite and enforceable property right until reduced to final judgment"); *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995) ("Causes of action are . . . not fully vested interests until reduced to final judgment."); *Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998) (retroactive application of federal statute to bar plaintiffs' pending claims for unpaid overtime compensation under Fair Labor Standards Act did not violate due process because "'a cause of action . . . affords no definite or enforceable property right until reduced to a final judgment'") (quoting *Adams v. Bowsher*, 946 F. Supp. 37, 43 (D.D.C. 1996)); *Deck v. Peter Romein's Sons, Inc.*, 109 F.3d 383 (7th Cir 1997) (retroactive application of AWPA workers' compensation exclusivity amendment to bar plaintiff's pending wrongful death claim did not violate due process).

an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover,

> [the] strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984).[4]

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[4] In keeping with these cases, courts have uniformly considered due process challenges to retroactive legislation affecting pending tort claims under the rational basis standard. *See, e.g., In re TMI*, 89 F.3d at 1113 (Price-Anderson Amendment of 1988); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d at 990-91 (Department of Energy National Security and Military Applications of Nuclear Authorization Act of 1985); *Hammond*, 786 F.2d at 13-14 (same).

Petitioners attempt to modify the rational basis standard by quoting selectively from *Pension Benefit Guaranty Corporation* and *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998). Petition at 11, 12. While the Court in *Pension Benefit Guaranty Corporation* noted that "the enactment of retroactive statutes confined to short and limited periods required by the practicalities of producing national legislation ... is a customary congressional practice," 467 U.S. at 731 (quotation marks omitted), the Court did not impose a time requirement or limit constitutional approval to those statutes whose retroactive application is "confined to short and limited periods" as Petitioners contend. Similarly, while the Court in *Apfel* noted that its decision "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the

The PLCAA easily passes muster under this standard. As the PLCAA's legislative findings make clear, Congress enacted the PLCAA to eliminate the unreasonable burden to interstate commerce posed by certain lawsuits against firearm manufacturers and sellers and to ensure the continued viability of an industry that arms the country's military and police, on the one hand, while at the same time preserving legitimate tort claims by persons injured by defectively made firearms and illegal firearm sales, on the other hand. *See* 15 U.S.C. §§ 7901(a)(6) & (8). These are legitimate legislative purposes; barring pending and future "qualified civil liability actions" is a rational means of furthering those goals.

A "qualified civil liability action" imposes unreasonable burdens on lawful interstate commerce in firearms and threatens the continued viability of the firearm industry. It does this by imposing crippling litigation costs on the defendants and by attempting to regulate, sometimes in conflict with existing federal laws, through court-ordered money damages and injunctive relief, the way manufacturers, distributors, and dealers design, market, and sell their products in interstate commerce. Contrary to Petitioners' bald assertion otherwise, prohibiting such lawsuits – both pending and future ones – is a logical means of eliminating those burdens. *See Ileto*, 421 F. Supp. 2d at 1302 & n.34 ("The legislative history contains repeated

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(continued...)

liability, and the extent of that liability is substantially disproportionate to the parties' experience," *Apfel*, 524 U.S. at 528-29, there is nothing in that opinion that suggests the same rule would apply to retroactive *immunity* as opposed to *liability*.

references about the dire consequences of these 'predatory' lawsuits.") (citing Congressional Record references to economic and national security concerns created by lawsuits against firearm makers); *see also id.* ("[A]s the district court in *Beretta* has already concluded, 'there is a rational basis for Congress' determination that the Act was necessary to protect [the firearms] industry.'") (quoting *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 287 (E.D.N.Y. 2005), *aff'd*, 524 F.3d 384 (2d Cir. 2008)).

Petitioners argue that the PLCAA is irrational because it prohibits common law claims while preserving identical statutory claims and dictates to states which branch of government can determine state law. Petition at 13-15. This argument is based on a fundamental mischaracterization of the PLCAA. The PLCAA merely prohibits claims against firearm manufacturers and sellers for harm resulting from the unlawful or criminal misuse of their products, and specifies certain exceptions to that general prohibition. Some of the exceptions preserve common law claims, *see, e.g.*, § 7903(5)(A)(iv) (breach of contract or warranty), and some preserve statute-based claims, *see, e.g.*, § 7903(5)(A)(i) (violation of 18 U.S.C. § 924(h) or comparable State felony law) and § 7903(5)(A)(iii) (violation of a state or federal statute applicable to the sale or marketing of a firearm). When Congress has the authority to preclude *all* claims against firearm manufacturers and sellers engaged in interstate commerce, prohibiting all but the particular types of actions that Congress deems appropriate does not make the statute irrational or unconstitutional. In short, Petitioners' argument that the PLCAA is irrational is based on a false premise. The lower court correctly held that

Petitioners failed to meet their burden of showing that Congress acted irrationally in passing the PLCAA.

II. Federal Constitutional Law Does Not Require That The Legislature Provide A Substitute Remedy When It Abrogates Or Modifies A Pending State Law Claim And, In Any Event, The Lower Court Correctly Found That The PLCAA Does Not Eliminate All Remedies

Petitioners argue that the PLCAA is unconstitutional because it eliminates Petitioners' rights and remedies without providing any alternative compensation scheme or substitute benefit. Petition at 15-20. Although this Court has not explicitly ruled on the issue, it has long expressed skepticism that there is any constitutional requirement to provide a substitute remedy: "[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Duke Power Co.*, 438 U.S. at 88 & n.32.

Lower courts have expressed similar skepticism. *See, e.g., Kyle Railways, Inc. v. Pacific Admin. Services, Inc.*, 990 F.2d 513, 518-19 (9th Cir. 1993) (rejecting argument that, by preempting any state law causes of action while failing to provide substitute federal causes of action, ERISA left "gap" in law and violated due process: "[S]uch a gap is legitimate if it is the result intended by Congress.") (quoting *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987)); *Ducharme v. Merrill-Nat'l Lab.*, 574 F.2d 1307, 1310 (5th Cir. 1978) (upholding Swine Flu Act against due process challenge and

noting that "[l]egislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away"); *Montgomery v. Daniels*, 340 N.E.2d 444, 453-54 (N.Y. 1975) (in upholding constitutionality of New York no-fault automobile accident compensation law, expressing skepticism that due process requires *quid pro quo*, but not reaching the issue: "Many States have abolished common-law causes of action by statute without providing any substitute remedy at all, e.g., the common-law right of a guest in an automobile to recover for the negligence of his host, or the common-law right of a party to sue in tort or contract for breach of promise to marry or for alienation of affections.") (citations and footnotes omitted).

By contrast, Petitioners rely on a number of *state* court decisions holding that certain *state* statutes violated *state* constitutional provisions by retroactively modifying or eliminating pending claims. Petition at 17-19. Petitioners' reliance is misplaced because *federal constitutional law*, not state law, determines whether a property interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause. *See Town of Castle Rock, Col. v. Gonzales*, 545 U.S. 748, 756-57 (2005). Under federal constitutional law, there is no vested interest in a cause of action until it is successfully pursued to a final, unappealable judgment.

Petitioners also cite *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988), *Martinez v. Calif.*, 444 U.S. 277, 281-82 (1980) and other cases for the proposition that a cause of action

is a species of property protected by due process. Petition at 19. But the unremarkable proposition that a cause of action is a property right protected by due process does not answer the more pertinent questions at issue here – namely, how much protection that right is due and under what circumstances the right may be abridged. None of those cases supports Petitioners' argument that Congress cannot modify or eliminate a pending tort claim unless it also provides a substitute remedy.[5]

Several recently enacted federal tort reform statutes do not provide any offsetting benefits for the common law causes of action they abrogate, at least to the parties directly affected by the loss of those claims. *See, e.g.*, General Aviation Act, Pub. L. No. 103-298, 108 Stat. 1552-54 (18-year statute of repose for claims against aircraft manufacturers); Food

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[5] Petitioners' reliance on the *Lochner*-era cases of *Ettor v. City of Tacoma*, 228 U.S. 148 (1913) and *Coombes v. Getz*, 285 U.S. 434 (1932) (Petition at 20), is also misplaced, as these cases have been effectively overruled by the modern cases reviewing substantive due process challenges to economic legislation under a rational basis test. *See Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554 (8th Cir. 1997). Their reliance on *Truax v. Corrigan*, 257 U.S. 312 (1921), Petition at 17, 18-19, is misplaced for the same reason. *See Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 287-88 (1957) ("The considerations that underlay that case [*Truax*] soon had to yield, through legislation and later through litigation, to the persuasiveness of undermining facts"). While *Truax* was the product of an "attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality," the tide later shifted to an increased deference to legislative judgment. *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 543-44 (1949) (Frankfurter, J., concurring). Judicial deference to legislative judgments in the area of economic regulation remains the law today.

Donation Act, 42 U.S.C. § 1791 (limiting liability for donors of food); Y2K Act, 15 U.S.C. §§ 6601-17 (capping damages against small businesses in Y2K actions). Nevertheless, these statutes provide benefits that extend to society as a whole. Here, the benefits of protecting innocent manufacturers and sellers of firearms from abusive lawsuits and preserving the viability of an industry that arms the nation's military and law enforcement personnel is more than adequate to justify the PLCAA under the applicable rational basis review.

Moreover, as the lower court recognized (App. 26a n.8), the PLCAA does not deprive Petitioners of all remedies, as they contend. Under the PLCAA, Petitioners and other victims of gun violence may still sue the gun traffickers and criminals directly responsible for their injuries. They also remain free to sue manufacturers and sellers where one of the six exceptions to the PLCAA applies. These civil remedies are in addition to the panoply of remedies available to the District of Columbia under the criminal code against violators of its laws. Far from stripping Petitioners of any right to redress, the PLCAA bars a narrow range of claims that seek to blame manufacturers and sellers for third-parties' criminal misuse of their non-defective products.[6]

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[6] As the Court of Appeals held, Petitioners' claim under the Strict Liability Act is precisely this sort of claim. The Strict Liability Act imposes liability on manufacturers and sellers of covered firearms "without regard to fault or proof of defect" whenever a criminal discharges one of those firearms in the District, causing bodily injury or death to another. Under the Strict Liability Act, the manufacturer's conduct is irrelevant: the manufacturer is liable even if its sale or marketing of the firearm at issue was perfectly lawful and non-negligent and even if the firearm was non-defective.

III. The Court Of Appeals Applied The Appropriate Standard In Reviewing Petitioners' Challenge To The PLCAA Under Substantive Due Process Principles

Petitioners contend that the lower court confused the standards applicable to procedural and substantive due process challenges in considering Petitioners' challenge to the PLCAA. However, it is Petitioners, and not the lower court, who have confused the two standards and the Court of Appeals' ruling.

In their briefs below, Petitioners cited *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) and other *procedural* due process cases[7] as support for their substantive due process challenge – namely, their argument that there is a vested right to pursue a state law tort claim which Congress cannot retroactively abolish. However, these cases do not support Petitioners' contention. In *Logan*, the State of Illinois terminated the plaintiff's cause of action for employment discrimination because a state official failed to comply with a statutorily mandated procedure. *Id.* at 424. This Court held that the State's action violated the plaintiff's right to *procedural* due process, not *substantive* due process. *Id.* at 433.

Here, the PLCAA directs the dismissal of Petitioners' lawsuit, not because of any procedural default but, rather, because Congress passed a substantive law barring such claims. As this Court stated in *Logan*, a legislature "remains free to create

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[7] *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Tulsa Prof. Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether – just as it can amend or terminate its welfare or employment programs." *Id.* at 432. While such actions might "deprive the plaintiffs [or beneficiaries of the welfare and employment programs] of a protected property interest," it is not a deprivation "without due process" because, in each case, "the legislative determination provides all the process that is due." *Id.* at 432-33 (citations omitted).

The lower court in this case properly concluded that (1) any *procedural* due process challenge advanced by Petitioners failed because "the legislative determination provides all the process that is due" and (2) Petitioners' *substantive* due process challenge failed because the PLCAA's retroactive application is supported by a legitimate legislative purpose furthered by rational means. App. 22a – 27a.

CONCLUSION

The petition should be denied.

DECEMBER 23, 2008

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